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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY, *Petitioner,*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY and PET MILK COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PET MILK COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinions below and this Court's prior opinion in this case are correctly cited in the Petition. The opinion for which review is now sought appears as Appendix A in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This action was brought under Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, which provides for the recovery of treble damages by a person injured in his business or property by a violation of the antitrust laws. The antitrust violations alleged in the complaint were violations of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, and Section 2(a) of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a). At this point in the litigation, there is no question of the construction or application of these statutes. The sole question is one of admissibility of evidence.

QUESTION PRESENTED

The sole question presented is whether or not the Supreme Court should grant certiorari when a court of appeals has remanded a case for a new trial after it has set aside a judgment based on a jury verdict on the ground that the trial court committed prejudicial error in the admission of evidence.

STATEMENT OF THE CASE

The petition for certiorari brings this case before this Court for the second time. The case began with a complaint filed by the petitioner, Utah Pie Company, in the United States District Court for the District of Utah against Pet Milk Company, Continental Baking Company, and Carnation Company. The complaint alleged a conspiracy among the three defendants, in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1. The complaint also alleged that each defendant independently had violated Section 2(a) of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C.

§ 13(a), through the sale of frozen fruit pies in Utah and neighboring states at prices lower than the prices charged for the pies elsewhere. The trial of the case resulted in a jury verdict in favor of the defendants for the alleged violation of the Sherman Act, and in verdicts against each defendant for the alleged violations of the Clayton Act. (Transcript of Record for the 10th Circuit Court of Appeals, pp. 1283-1284) Damages were awarded to the plaintiff for the violations of the Clayton Act.

On appeal by the defendants, the Court of Appeals for the Tenth Circuit reversed the judgments against the appellant-defendants, including that against the Pet Milk Company on whose behalf this brief is filed. The basis for the reversal was "that the evidence was wholly insufficient to support a finding that Pet" had violated Section 2(a) through its pricing practices in Utah. *Continental Baking Co.* v. *Utah Pie Co.,* 349 F. 2d 122 (10th Cir. 1965), rev'd. 386 U.S. 685 (1967) The Court of Appeals then directed the trial court to enter judgment in favor of Pet. (349 F. 2d at 152)

In response to the reversal, the Utah Pie Company filed a petition for a writ of certiorari in this Court. The granting of that writ was opposed by the Pet Milk Company on the ground that the Court does not grant certiorari when the sole ground for reversal by a federal court of appeals of a judgment based on a jury verdict is the insufficiency of the evidence.

At about the same time a petition for certiorari was filed in another case in which the Court of Appeals for the Tenth Circuit had reversed a judgment based on a jury verdict for the plaintiff and had directed dismissal of the action. *Neely* v. *Martin K. Eby Constr.*

Co., 344 F. 2d 482 (10th Cir. 1965), aff'd 386 U.S. 317 (1967) That petition had questioned the authority of a court of appeals to set aside a judgment based on a jury verdict and direct dismissal of an action under Rule 50 of the Federal Rules of Civil Procedure, as amended effective July 1, 1963. (374 U.S. 865, 885)

On November 15, 1965, this Court granted certiorari in response to both the *Neely* and *Utah Pie* petitions. (382 U.S. 914) In its orders, the Court asked counsel for all parties in both cases to brief and discuss at oral argument several questions on the authority of the courts of appeals, based on the question posed in the *Neely* petition.[1]

In its *Neely* opinion, the Court concluded that courts of appeals have authority to direct entry of judgment

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[1] The questions as stated in the order granting certiorari in the *Utah Pie* case were as follows:

> 1. Whether, if this Court affirms the judgment ond order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50(c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?
>
> 2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's entry of judgment against him, the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50(b) as interpreted by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571; and *Weade* v. *Dichmann, Wright & Pugh*, 337 U.S. 801?
>
> 3. Whether Rule 50(d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents? (382 U.S. at 914)

notwithstanding a jury verdict (386 U.S. at 321-326), although the Court suggested that the authority be used sparingly when the basis for reversal is an insufficiency of evidence. (*Id.*, at 327)

The Court did not discuss the questions in *Utah Pie Co.* v. *Continental Baking Co.* (*Id.*, at 688, n. 4) Instead the Court limited itself, as the Court of Appeals had done, to a consideration of the sufficiency of the evidence on the alleged violation of Section 2(a) by each of the respondents. The Court concluded that there was sufficient evidence to support the jury's verdict of a violation by each respondent. (*Id.*, at 704) Since the Court of Appeals had not passed on other grounds urged by the respondents, this Court remanded the case to the Court of Appeals "for further proceedings." (*Ibid.*)

On remand, the Court of Appeals accepted this Court's determination that there was sufficient evidence on the question of violations of Section 2(a) (Petition, Appendix A, p. 5); and the court moved on to the next step in Utah Pie's treble-damage action —to the proof of injury Utah Pie may have suffered as a result of the violations. The Court of Appeals concluded that Plaintiff's Exhibit 95, characterized by Utah Pie in its Petition, page 6, as its "basic damage exhibit," and exhibits on which 95 was based "presented a clearly erroneous factual foundation for the computation of damages, and that their admission was plain and prejudicial error." (Petition, Appendix A, p. 64)

One of the court's reasons for holding the "damage exhibits" inadmissible was that, in drawing up the exhibits, Utah Pie had "treated all of the price dis-

criminations of the several appellants as constituent parts of a single whole, or as joint acts of the appellants." (Petition, Appendix A, p. 33) This "would have been proper," the court said, "had Utah Pie established its conspiracy claim, but the jury returned a separate verdict against Utah Pie on its conspiracy claim . . ." (*Ibid.*) It was not a proper foundation for assessing damages for the violations of Section 2(a), since "each appellant was liable only for the injuries caused by its first § 2(a) violation and its § 2(a) violations thereafter, and it was not liable for injuries caused by the § 2(a) violations of the other two appellants." (*Ibid.*)

The court also held that opinion testimony of Utah Pie's salesman that the decline in sales of its Utah brand pies was attributable to the appellants' price discrimination was not credible, in view of Utah Pie's greatly increased sales of Frost 'N' Flame brand pie to a large customer, at prices substantially below the price of its Utah brand pie and below the defendants' prices. (*Id.*, at 27-30)

On reversing the judgment against Pet and the other appellants the Court of Appeals, consistent with this Court's opinion in the *Neely* case and with views often expressed by Mr. Justice Black, remanded the case for a new trial. To "avoid confusion and to be fair to each of the appellants," the court outlined a procedure that would permit the introduction of evidence "of general application" against all three appellants, while preserving for each the right to have evidence on its 2(a) violation and the effect of the violation on Utah Pie presented separately. (*Id.* at 48-49)

SUMMARY OF ARGUMENT

The petition for writ of certiorari presents no question of general public interest to be decided by this Court.

The case, a treble-damage antitrust action based on alleged price discriminations by three companies in the sale of frozen fruit pies in the Salt Lake market, has been under appellate review for a total of 21 months—for slightly more than three months by this Court, and for 18 months by the Court of Appeals for the Tenth Circuit.

In its final consideration of the case the Court of Appeals held that the admission by the trial judge of several exhibits, purporting to establish the amount of damage the plaintiff had suffered, was prejudicial error, and the cause was remanded to the trial court for a new trial.

Although the petition poses questions in terms consistent with Rule 19(1)(b) of this Court's rules,[2] the

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[2] Rule 19. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

only question that can possibly grow out of the Court of Appeals' decision is whether or not, on its review of the evidence, the Court of Appeals was correct in holding the admission of certain damage exhibits to be prejudicial error, and in ordering a new trial. A determination of the admissibility of this evidence required the Court of Appeals to examine the underlying factual basis for the exhibits, which presents no question for review by this Court. The Court of Appeals' order for a new trial is entirely consistent with repeated holdings of this Court that the admission of prejudicial evidence by a trial court can be cured only by a new trial. The Court of Appeals' direction that evidence be taken separately as against each defendant on the price discrimination charge and the resultant damage, if any, to Utah Pie is entirely consistent with elementary justice and with the *Restatement of Torts*.

There is no question, as the petition contends, of conflict with a decision of this Court on a federal question, of an invasion by the Court of Appeals of the jury's "province," of conflict between circuits on some question of law. There are no "special and important reasons" for the Court's granting certiorari and undertaking again in this case the "arduous task of searching through voluminous trial testimony and exhibits," a search that has already occupied this Court for three months and the Court of Appeals for 18 months.

ARGUMENT

I. The petition for writ of certiorari presents no federal question of broad interest for determination by the Supreme Court.

The questions presented by Utah Pie Company's petition for certiorari do not fall within any of the categories of questions set forth in Rule 19 of this Court's rules in which certiorari may be granted, although the petition attempts to bring the questions within two or three of the categories.

Actually there is only one narrow, factual question to be drawn from the Court of Appeals' decision. That is whether a proper foundation had been laid in the trial court for the admission into evidence of what petitioner calls "Utah Pie's basic damage exhibit." (Petition, p. 6) On an exhaustive review of the evidence the Court of Appeals held that a proper foundation had not been laid, and that admission of the exhibit into evidence was prejudicial to the defendants and was reversible error. So that the error might be corrected, the court directed a new trial, and outlined procedures to be followed in a new trial to prevent evidence against one defendant from clouding the issue against the other defendants. (Petition, Appendix A, pp. 48-49)

The function of the Supreme Court in granting certiorari has been ably stated by a former Chief Justice of the Court, Chief Justice Vinson, in an address before the American Bar Association, on September 7, 1949. The Chief Justice concluded his address by saying:

> "To remain effective, the Supreme Court must continue to decide only those cases which present

> questions whose resolution will have immediate importance far beyond the particular facts and parties involved." (Quoted in Stern & Gressman, *Supreme Court Practice* (1962) p. 120.)

Similar views were stated by the Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923), dismissing a writ of certiorari, and were repeated with approval in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), vacating 348 U.S. 880 (1954). In the *Rice* opinion the Court also reviewed the basis for Rule 19. (349 U.S. at 73-74)

There is in Utah Pie's petition no question "whose resolution will have immediate importance far beyond the particular facts and parties involved"; no "principles the settlement of which is important to the public"; no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal"; not even a question that, when "abstractly considered," might "present an intellectually interesting and solid problem." (See 261 U.S. at 393 and 349 U.S. at 74, 79.)

2. This case has had extensive appellate review—18 months' review by the Court of Appeals for the Tenth Circuit and three months' review by the Supreme Court.

This Court has frequently spoken of the need for assistance by the courts of appeals in reviewing extensive records usually produced in antitrust cases. In *United States* v. *Singer Mfg. Co.*, 374 U.S. 174 (1963), reversing 205 F. Supp. 394 (S.D.N.Y. 1962), Mr. Justice Clark commented critically on the Expediting Act, 58 Stat. 272, 15 U.S.C. § 29, which brings antitrust cases to which the United States is a party directly

from the district courts to the Supreme Court for review. "Whatever may have been the wisdom" of the act, the justice said, "at the time of its enactment in 1903, time has proven it unsatisfactory . . . Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." (374 U.S. at 175, n. 1) Mr. Justice Harlan expressly approved Mr. Justice Clark's statement, and spoke of the act as "an anachronism in view of the modern work load of this Court." (*Id.*, at 202)

In this case, the Court has had the "valuable assistance" of a review of the record to which Chief Judge Murrah and Judges Phillips and Lewis gave a year and a half of their time. The Transcript of Record, consisting of some 5752 pages in the original before the Court of Appeals and of 5867 pages as printed for this Court, was under review by the Court of Appeals for ten and one-half months between oral argument on July 11, 1964 and the rendering of the court's opinion on May 25, 1965. It was under review by this Court for a little more than three months, between argument on January 17, 1967 and opinion, on April 24, 1967. The case was again under review by the Court of Appeals for almost eight months, between oral argument on September 13, 1967, and opinion, on May 7, 1968. Surely, with only a question of the admissibility of evidence before it, this extensive review is reason enough for this Court not to undertake again the "arduous task of searching through voluminous trial testimony and exhibits. . ." which Mr. Justice Harlan has deplored. (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 364, 1961; affirming 179 F. Supp. 721, E.D. Mo. 1959)

3. Utah Pie's "basic damage exhibit" and the underlying exhibits are plainly erroneous on their face.

Pet Milk Company commends the thoughtful opinion of Judge Phillips to the Court; but, even without the extensive analysis made by the Court of Appeals, Utah Pie's "basic damage exhibit" and the underlying exhibits are erroneous on their face, if for only one reason. The exhibits present claims for damages for the entire year 1959, although not until December 1959 did Pet sell frozen fruit pies in the Salt Lake market at a price lower than the price elsewhere. (349 U.S. at 152) That is, not until December 1959 did any violation of law occur that might be a basis for recovery of damages by Utah Pie.

Part (A) of Pl. Ex. 95 states a claim against Pet for $34,197 profits Utah Pie would have made if it had maintained its "1958 market position in relation to defendants," based on a selling price of $3.70 a dozen; or $57,555, based on a selling price of $4.30 per dozen. (The exhibits discussed here appear in the petition in an Appendix A pages I-XVI, and a page "23" following that appendix. In the Transcript of Record for this Court when the case was before it on certiorari for the first time, October Term, 1966, No. 18, the exhibits appear on pages 4591-4607. It is believed it will be more convenient to refer in this discussion to pages in that Transcript of Record. Pl. Ex. 95 appears there on page 4591.) The $34,197 and $57,555 come from Pl. Ex. 96 (Transcript of Record 4593-4594, 4597) where it is clear that the "Additional Dozens" Utah Pie claims it would have sold in relation to Pet are given for the entire years 1959 and 1960, and for January 1, 1961 to August 31, 1961. (The close resemblance between the $34,197 shown in Part (A) of Pl. Ex. 95

and the jury's award of $44,197 in damages as against Pet strongly suggests the prejudicial nature of the admission of the exhibit.)

Similarly, Parts (B) and (F) of Pl. Ex. 95 (Transcript of Record, 4591) makes claims for damages for the entire year 1959. (See Pl. Exs. 97 and 101, Transcript of Record, 4598-4599, and 4606-4607.)

Part (B) of Pl. Ex. 95 and Pl. Ex. 97 are also without foundation when they make a claim for damages on frozen fruit pies not sold by Utah Pie in the Seattle, Spokane and Portland Areas in 1959, for Utah Pie's salesman testified that the "first attempt" of the company "to go into Portland" was made in "January of 1960" (Transcript of Record, 542); and that, with no one "permanently" representing the company in Spokane, Portland and Seattle, his two weeks' trip to the area in January or February 1961 was the only real effort made to sell pies there. (*Id.*, at 778)

Parts (D) and (E), with underlying Pl. Exs. 99 and 100 (Transcript of Record, 4591, 4602-4603, 4604-4605) are in error in making claims for damages incurred in 1959 by reason of a contract between Pet and Safeway Stores, Inc., because the contract was not entered into until December 1959, effective January 1, 1960. (Transcript of Record, 2226, 2235)

These are all errors the Court might notice under Rule 40(1)(d)(2) of its rules.[3]

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[3] Rule 40. BRIEFS—IN GENERAL. * * * Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

4. There is no conflict between the Court of Appeals' second opinion in this case and any decision of the Supreme Court.

Utah Pie's statement of its first reason for granting the writ (Petition, p. 21) is an attempt to bring the petition within that part of Rule 19(b) of the Court's rules which states that consideration will be given to a petition when "a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court . . ."

The Tenth Circuit's opinion in no way conflicts with a decision of this Court on a federal question, and in no way "conflicts with the decision of this Court in the self-same case." This Court, in its first *Utah Pie* opinion, decided only that the evidence had been sufficient to support the jury's conclusion that Pet's price differences created a "reasonably possible injury to competition," in the Salt Lake market, in violation of Section 2(a) of the Clayton Act. (386 U.S. at 698, 703) The Court expressly refrained from "intimating any views on the other grounds presented to the Court of Appeals . . ." (*Id.*, at 704)

The Court of Appeals in its second opinion in the case accepted this Court's determination that there had been a violation of Section 2(a). (Petition, Appendix A, p. 5) The Court of Appeals then went on to one of the other grounds presented to it: namely, to a consideration of the objections to the admission of "Utah Pie's basic damage exhibit." (Petition, p. 6)

The Court of Appeals' analysis of all evidence relevant to injury or damage to Utah Pie, and to the "basic damage exhibit" led the court to conclude that this exhibit and the exhibits on which it was based "presented a clearly erroneous factual foundation for the computation of damages, and that their admission was

plain and prejudicial error." (Petition, Appendix A, p. 64)

A conclusion by the Court of Appeals that the admission of an exhibit in the trial court was prejudicial error cannot in any way conflict with a decision by this Court that there was evidence of a "reasonably possible injury to competition" as a result of Pet's price differences in the Salt Lake market.

Utah Pie at several places in its petition (pp. 7-9, pp. 21-22) contends that this Court expressly reversed every statement of the Court of Appeals' first opinion, and that the Court of Appeals in its second opinion went ahead with complete disregard for the Supreme Court's opinion. This is simply not true.

The Court of Appeals in its second decision did say, as quoted in the Petition, p. 22, ". . . in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts . . ."; but the court also expressly accepted this Court's conclusion with respect to the violation of Section 2(a). (Petition, Appendix A, p. 5) The statement of the Court of Appeals about its former opinion, as quoted above, was a preface to its comment that it would, in its second, rely upon some of the facts stated in the former opinion. (Petition, Appendix A, p. 7)

5. The Tenth Circuit has not "invaded the jury's province to decide questions of causation."

Utah Pie states as its second reason for granting a writ, that the Court of Appeals "has invaded the jury's province" on the subject of causation. (Petition, p. 24) Again Utah Pie refuses to accept the actual holding of the Court of Appeals, and Utah Pie refuses to recognize how the court approached its task. The

Court of Appeals analyzed various kinds of evidence with respect to Utah Pie's sales to determine whether or not the presentation in Pl. Ex. 95 was consistent with this evidence. The court concluded it was not, that the admission of Pl. Ex. 95 and its underlying exhibits was prejudicial error, and that a new trial must be had. (Petition, Appendix A, pp. 64-65)

The court was not weighing "contradictory evidence" to determine whether the evidence supported the jury's verdict. The court was instead determining a question of law—that is, whether the trial judge had permitted the jury to consider prejudicial evidence.

6. The Tenth Circuit's opinion does not conflict with opinions of other circuits on the interpretation of jury verdicts.

Utah Pie's third reason for granting a writ is an attempt to bring its petition within that category of cases described in Rule 19(1)(b) of the Court's rules as "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ." (Petition, p. 26)

It is true that the Court of Appeals studied Pl. Ex. 95 in view of the jury's verdict, and concluded that the award of $44,197 in damages as against Pet Milk Company was undoubtedly composed of $34,197 from (A) of Pl. Ex. 95 plus an award of $10,000 from (G) of the exhibit. This conclusion did not require a great deal of clairvoyance on the part of Judges Phillips, Murrah and Lewis. Even if the analysis of the verdict goes beyond comments by other circuits on the "mantle of impenetrable darkness" that falls over a jury verdict, the analysis is not essential to the court's final conclusion.

The court's conclusion was that the admission of Pl. Ex. 95, described as "Utah Pie's basic damage exhibit" (Petition, p. 6), and the underlying exhibits was prejudicial error, which can be cured only by a new trial.

In setting aside a general verdict and ordering a new trial for prejudicial error in the admission of evidence, an appellate court need not show that a jury relied upon the improperly admitted evidence. This Court has repeatedly made this principle clear.

> "If the [trial] court erred in admitting as testimony papers which ought not to have been received, the judgment is of course to be reversed and a new trial awarded. It is urged that there is enough in the record to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that effect might be given. If this was even true in point of fact, the inference is not correctly drawn. There must be a new trial . . ." *Church* v. *Hubbart*, 2 Cranch 187, 239, 2 L. ed. 249, 266 (1804)
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> * * *
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> "On the trial, evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given . . . This testimony was clearly inadmissible . . . The evidence, too, was material . . . the case must, for this error, go back for a new trial." *Maryland* v. *Baldwin*, 112 U.S. 490, 493-494 (1884)
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> * * *

"As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it its admission requires that the

"*Judgment be reversed, and the case remanded to the Supreme Court of the State of Washington, with directions to set aside the verdict and to order a new trial.*" *Columbia & Puget Sound R. Co.* v. *Hawthorne,* 144 U.S. 202, 208 (1892)

* * *

"Since we hold erroneous one theory of liability upon which the general verdict may have rested—a conspiracy among petitioners and Exchange Lemon—it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland* v. *Baldwin,* 112 U.S. 490, 493 (1884), '[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld. . . .'" *Sunkist* v. *Winckler & Smith Co.,* 370 U.S. 19, 29-30 (1962)

7. Adequate objection to the admission of Pl. Ex. 95 and the underlying exhibits was made by Pet Milk Company, Carnation Company, and Continental Baking Co.

As its fourth reason for the Court's granting a writ of certiorari in this case Utah Pie claims that the Court of Appeals has based its decision on "purported errors" to which no adequate objection was made during the trial. (Petition, p. 27) This claim is completely refuted by the 38 pages of the Transcript of Record filed with this Court on the first grant of certiorari (pages 560-598) devoted to colloquys in the trial

court on the exhibits, including repeated objections by the defendants to the admission of the exhibits.

Pet's objection to the entire theory on which Pl. Ex. 95 was based is highlighted by the fact that it attempted to elicit testimony from an expert witness on the soundness of the theory, but the testimony was stricken from the record by the trial judge on the motion of Utah Pie's counsel. (*Id.*, at 1107-1109) The objection is further emphasized by Pet's objection to the trial court's refusal to grant an instruction to the jury with respect to the basic theory of the exhibit. (*Id.*, at 15) This was the theory that Utah Pie was entitled to maintain in perpetuity 70.41% of a market including only the pies of the defendants' "house" pies and the Utah brand pie. (See Pl. Ex. 96, Transcript of Record, 4592-4593.)

8. The Court of Appeals' observations on the disputed exhibit go to the admissibility, not the weight: the Court's ruling is entirely consistent with the Second Circuit's ruling in the Schwabe case.

An exhibit found to be based on "a clearly erroneous factual foundation" and which on its face is clearly erroneous (see pp. 12-13, *supra*) is simply inadmissible; and if the admission of the evidence is found to be prejudicial the trial court's error can only be corrected by a new trial. (See quotations *supra* from *Church* v. *Hubbart, Maryland* v. *Baldwin, Columbia & Puget Sound R. Co.* v. *Hawthorne,* and *Sunkist* v. *Winckler & Smith Co.*)

The Court of Appeals' decision in this case, although it was reversing rather than affirming a trial judge's admission of evidence, is entirely consistent with the case cited by Utah Pie (Petition, p. 29), *Herman*

Schwabe, Inc. v. *United Shoe Machinery Corp.*, 297 F. 2d 906 (2d Cir. 1962). In that opinion, following the sentence quoted by Utah Pie, the court went on to say:

> "Yet it is the jury system itself that requires the common law 'judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning * * * to exclude matter which does not rise to a clearly sufficient degree of value'; 'something more than a minimum of probative value' is required. 1 Wigmore, Evidence (3d ed. 1940), pp. 409-410. *These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.* It might indeed have been possible for a judge, with days in which to study the exhibits of plaintiff's expert, to come up with some rational computation of damages, on a theory wholly different from what the expert advocated, that would satisfy the Supreme Court's modest requirements in this area; it would be foolhardy to expect a jury to do so. 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out,' Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933).
>
> "These principles required exclusion; the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take. Many decisions have rejected evidence of injury and damages comparable in weight with that submitted here." (*Id.*, at 912. Emphasis added.)

9. The Court of Appeals has said that the admission of Utah Pie's "basic damage exhibit" was prejudicial error, not that Utah Pie failed to prove its damages with "requisite certainty."

Pet still retains doubts that a company that "was immediately successful with its new line" of pies, whose "sales volume steadily increased over the" years in question, whose "financial position also improved," whose net worth more than doubled during those years, whose net income went from a loss to a substantial gain (386 U.S. at 689), whose "major competitive weapon in the Utah market was price," and whose "prices were the lowest" in its market (*Id.*, at 690) can prove damage from Pet's occasional price differences in that market with "requisite certainty." This question is not before the Court, however, and Utah Pie's sixth reason for granting a writ (Petition, p. 30), simply overlooks what it is the Court of Appeals ruled upon. The court ruled that the admission of Pl. Ex. 95 and its underlying exhibits was prejudicial error, to be cured by granting a new trial. The cases cited by Utah Pie in this part of its petition have no application to the question now before this Court.

10. The Court of Appeals' direction that the price discrimination charge and consequent damage to Utah Pie be proven separately is correct; Utah Pie's reliance on Section 433A of the Restatement of Torts, 2d, with respect to burden of proof, is misplaced.

In its seventh reason for granting certiorari (Petition, p. 32) Utah Pie takes issue with that part of the Court of Appeals' opinion that would require Utah Pie, at a new trial, to prove separately the damages resulting from each defendant's price discrimination. This, Utah Pie says, is in error in view of Section 433A of *Restatement of Torts*, 2d, which provides for

an apportionment of damages in some cases. Utah Pie also cites § 433B of the *Restatement* as placing a burden of proof for apportionment on the defendants.

Subsections (1) and (2) of this section read:

> "(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
>
> "(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."

(Subsection (3) appears to have no present application.)

Subsection (2) is an exception to the general rule, stated in subsection (1), that normally the burden is upon the plaintiff to prove defendant was responsible for his damages, but subsection (2) is not applicable here. There was no showing that the violation of Section 2(a) by one defendant was "combined" in any way with the violation by another defendant, as is proven by the jury's verdict in favor of the defendants on the alleged conspiracy charge.

In addition, each defendant violated Section 2(a) at varying times and in varying degrees. Pet's lower prices in the Salt Lake market occurred in December 1959 ($3.80 per dozen), February and March 1960 ($3.70 per dozen), July and August 1960 ($4.00 per dozen), January and February 1961 ($3.70 per dozen), and March and April 1961 ($3.56 per dozen). (349

F. 2d at 159-160) Carnation's lower prices occurred in February and March 1960 ($3.30 per dozen), April-June 1960 ($3.48 per dozen), October 1960 ($3.90 per dozen), and November and December 1960 ($3.86 per dozen). (*Id.*, at 164-165) Continental's low prices occurred in June and July 1961 ($2.75 per dozen). (*Id.*, at 138, 141)

There is no pattern here that would permit a conclusion that "the tortious conduct of two or more actors has combined to bring about harm to the plaintiff" to require or permit a shifting of the burden of proof under Section 433A of the *Restatement.*

(In December 1959, Utah Pie's lowest price in the Salt Lake market was $3.60 per dozen, while Pet's lowest price was $3.80 per dozen; during all of 1960 Utah Pie's lowest price was $3.00-$3.10, while Pet's lowest price was $3.70 and $4.00. During the first four months of 1961, Utah Pie's lowest price was $3.10 per dozen, while Pet's lowest prices were $3.70 and $3.56 per dozen. 349 F. 2d at 159-160)

In point in the present case is Comment C under Section 433A, which reads:

> "c. *Successive injuries.* The harm inflicted may be conveniently severable in point of time. Thus if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other."

If harm was done to Utah Pie by Pet's pricing it was independent of harm that may have been inflicted by Carnation and Continental; and Utah Pie had the

burden of proving the harm caused by Pet. This is elementary justice. To permit Utah Pie to take its total damages (assuming some damages to have been proven) and apportion them between the defendants, month by month over a period of three years, without reference in point of time to an actual violation of Section 2(a) by Pet or to the magnitude of any violation, as was done in Pl. Ex. 95 and the underlying exhibits, is clearly improper.

11. Utah Pie's reference to the Perma Life Muffler opinion in its eighth reason for granting the writ has no application in the present situation.

As an eighth reason for the Court's granting a writ of certiorari in this case, Utah Pie states that the Tenth Circuit applies an incorrect rule of causation when it directs Utah Pie in a new trial to prove separately the damages it may have suffered as a result of each defendant's 2(a) violation; and the petition contains a brief quotation from the opinion of Mr. Justice White in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). (Petition, p. 34)

In the *Perma Life* opinion the Court considered the availability of the *in pari delicto* defense when one party to an antitrust violation sues the other party for treble damages. Mr. Justice White, in his concurring opinion, urged that the defense be adapted to the aim of Section 4 of the Clayton Act. (*Id.*, at ..) That aim is to deter antitrust violations by awarding damages to those injured by the violations. This aim or purpose is best served, he said, when those primarily responsible for a violation are liable in damages to those who are injured thereby. Thus, when one who participates in an antitrust violation sues another par-

ticipant, he may recover if the other has been primarily responsible for the violation. If the two are equally guilty, according to Mr. Justice White, neither should recover from the other. "This rule," he said, "would simply pose the issue of causation in particularized form." (*Id.*, at . . . See Slip Opinion, Mr. Justice White concurring, pp. 2, 5.)

The action of the Court of Appeals, in directing that each defendant be held liable only for the damages his activity may have caused seems consistent, rather than inconsistent, with the approach suggested by Mr. Justice White.

CONCLUSION

The petition for a writ of certiorari filed on behalf of Utah Pie Company presents no question of significance to be decided by this Court. The decision below turns on its own facts and the outcome of the case will affect no one but the litigants. Because only a narrow factual issue is presented the petition should be denied.

Respectfully submitted,

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